

## Case Comment. Priorities and Registered Land during the Registration Gap

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# Priorities and Registered Land during the Registration Gap

## Introduction

The recent High Court Chancery case of *Baker v Craggs*, which was heard before Newey J in the Bristol District Registry, highlights the importance to practitioners of preparing proper plans, and of answering land registry requisitions in a timely fashion during the registration gap in order to avoid applications being cancelled, thereby losing priority.<sup>1</sup> The case is of further interest to practitioners in that it considers, by reference to the registration gap, when an estate contract is not an estate contract and it also acts as a reminder for practitioners to be vigilant in checking third party rights when dealing with transfers of part

The decision also considers overriding interests which is useful to undergraduate students of land law, in particular, for the trial judge's analysis of the meaning of "actual occupation" in the context of the Land Registration Act 2002. Further, both practitioners and students will be interested in the academic arguments which have arisen following the case concerning basic concepts in relation to the meaning of a "legal estate" and the operation of the doctrine of overreaching. In the specific context of overreaching, there has been academic criticism<sup>2</sup> of that part of Newey J's judgment which held that the grant of a legal easement, being a derivative interest in land, could trigger overreaching.

This case note will argue that the trial judge was correct in his application of the law, insofar as it relates to overriding interests, but that he applied too broad an interpretation of the term "legal estate" in section 2 (1) Law of Property Act 1925 and that the overreaching machinery provided for in that section should not have been invoked. As for the issue as to

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<sup>1</sup> [2016] EWHC 3250 (Ch). Judgment was handed down on 15 December 2016.

<sup>2</sup> See M.Dixon, Editors Notebook, *The Conveyancer and Property Lawyer*, (2017) 81 Conv. pp3-5.

when an estate contract ceases to be an estate contract in the context of registered land, this is a difficult issue and notwithstanding the judge's finding that there was no estate contract following completion of the defendant's transfer, those difficulties and uncertainties still remain.

### **The facts**

In brief, the case concerned the efficacy of the grant of a right of way. A certain farm in Somerset had been in the sole ownership of Mr and Mrs Charlton until 2012, at which point they sold off various tranches of the farm to two different purchasers, retaining certain buildings for themselves to be used as their residence. The transfers made by the Charltons were in favour of Mr Craggs, the defendant, and Mr and Mrs Baker, the claimants. The various transfers may be summarised as follows:

On 17 January 2012, there was a transfer of part to the defendant comprising some 18 acres of fields and barns *together with a yard* along with a right of way over a driveway leading from the yard over part of the Charltons' retained land. The defendant's solicitors had carried out the usual land registry search prior to completion with a priority period expiring on 28 February 2012. The defendant's transfer was first lodged for registration on 10 February 2012, i.e. within the thirty day priority period prescribed under the Land Registration Rules 2003,<sup>3</sup> and also within the prescribed two month period for applying for registration of title.<sup>4</sup> On 22 March 2012 the land registry raised a requisition stating that the access way from the yard over the Charltons' retained land was not shown on the plan attached to the transfer. The defendant's solicitors were given until 9 May 2012 to deal with the requisition. In fact, they did not deal with the requisition and the defendant's application

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<sup>3</sup> See Land Registry Practice guide 12: official searches and outline applications, updated 9 January 2017, paras 4.2 and 4.3.

<sup>4</sup> See section 6(4) Land Registration Act 2002.

for registration was cancelled on 9 May 2012. A fresh application was subsequently made with an amended plan and on 16 May 2012 the defendant was registered with title to the land which had been transferred to him.

In the meantime, on 9 February 2012 the Charltons had exchanged contracts in respect of the sales of other tranches of the farm to the claimants, comprising the farmhouse and a barn (the claimants' barn). These sales were completed by way of two transfers on 20 February 2012. It is important to note that the transfer of the claimants' barn purported to grant the claimants a right of way over *the very yard which had been transferred by the Charltons in favour of the defendant*. The duplication of these rights had not been picked up by the defendant's solicitors. On 14 March 2012, the claimants were registered with the land transferred to them *with the benefit of the rights over the defendant's yard, and the defendant's register was recorded as being subject to those rights*. Accordingly, the question before the court was whether the claimants had the benefit of a right of way over the defendant's yard which it will be recalled comprised part of the land transferred to him, and this gave rise to various legal issues.

### **The legal issues**

It was common ground between the parties that up until the point at which the defendant became the registered proprietor of the yard he only had an equitable interest in the land transferred to him. It was also common ground that the provisions of s 29 Land Registration Act 2002 postponed the defendant's equitable interest, unless it could be shown to have had priority at the time of registration in the claimant's favour. In brief, the overarching issue in the case concerned whether the claimants' transfer had priority over the defendant's transfer, and this main issue was broken down into two subsidiary questions: namely, (1) whether, at the point when the transfer to the claimants was completed, the defendant had been in "actual

occupation” of the yard thereby providing the defendant with an overriding interest, and if so, (2) had any such overriding interest been overreached? These issues unfolded in the following three-staged approach adopted by the trial judge:

1. In view of the fact that the defendant had first lodged his transfer within the priority period provided by his land registry search, that provided the defendant, at that point, with priority over a subsequent transfer lodged by the claimants. The trouble was that the defendant’s solicitors failed to deal with the land registry requisition promptly, and his application was cancelled on 9 May 2012. It will be recalled that the claimants’ right of way over the yard was registered in their favour on 14 March 2012, and following the cancellation on 9 May 2012, this took priority over the defendant’s registration of title of the yard in his favour on 16 May 2016. Any subsequent land registry search carried out by the defendant would have provided a second priority period in favour of the defendant, but it would not have been effective to extend the priority afforded by the defendant’s first land registry search.

2. Therefore, what else could be done on the defendant’s behalf to give him priority? He only had an equitable interest, and the claimants had been registered with rights extending over the defendant’s yard. Counsel for the defendant argued that notwithstanding the effects of s 29 Land Registration Act 2002, the defendant’s equitable interest took priority over the subsequent transfer in favour of the claimants on the basis that the defendant was at all material times “in actual occupation” of the yard, and that this constituted an overriding interest pursuant to the provisions of Schedule 3 Land Registration Act 2002, and as will be seen the trial judge made a finding to this effect in the defendant’s favour.

3. As the trial judge had found for the defendant on the overriding interest point, the only course of action open to Counsel for the claimants was to argue that the rights giving rise to the overriding interest (i.e. the “actual occupation” by the defendant) had been effectively

overreached. It should be remembered that where the conditions which enable overreaching are satisfied, an overriding interest will not defeat overreaching.<sup>5</sup> On the facts of the case, when the Charltons granted the claimants the easement, the claimants paid the capital monies in respect of the transfer of the claimant's barn and easement over the defendant's yard over to two trustees (i.e. Mr and Mrs Charlton) who then held the yard as bare trustees for the defendant (in the absence of "title by registration" in the defendant's favour), thereby, according to the trial judge, satisfying the requirements for overreaching the defendant's equitable interest pursuant to sections 2 and 27 of the Law of Property Act 1925 (LPA 1925). Counsel for the defendant advanced various arguments against this which will be considered in this note, but the analysis will move on to consider the overriding interest point first of all.

### **Overriding interest arising out of actual occupation**

The case is of interest for the very clear summary provided by Newey J of the relevant case law concerning the meaning of "in actual occupation", and for the clear application of the facts to the relevant law, which will be of great assistance to students. It was common ground between the parties that none of the exceptions set out in paragraph 2 of Schedule 3 of the Land Registration Act 2002 (LRA 2002) applied as there was no question of any interest under a Settled Land Act settlement (para 2(a)); no inquiry had been made by the claimants of the defendant prior to the relevant transfer (para 2(b)); and even if the defendant's occupation would not have been obvious on a reasonably careful inspection at the date of the relevant transfer, it was common ground that the claimants' solicitors had knowledge of the transfer in favour of the defendant (para 2(c)). Therefore, as none of the exceptions applied, the court had to consider whether on the facts the defendant had been in actual occupation in order to claim priority over the claimants.

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<sup>5</sup> See G.Owen, "A New Paradigm for Overreaching—Some Inspiration from Down Under", pp 377-394 at p380.

Before considering the issue of what constitutes in actual occupation (which is not defined in the LRA 2002), consideration had to be given to precisely *when* an occupier needs to be in actual occupation in order for a purchaser to be bound by the rights of the occupier. In *Abbey National Building Society v Cann*<sup>6</sup> this was held to be at the date of the disposition, i.e. the completion of the sale by the Charltons to the claimants which was on 20 February 2012. In this respect Newey J did not consider the obiter dicta of Lewison J in *Thompson v Foy*<sup>7</sup> to the effect that an occupier has to be in occupation at the date of registration *as well as* the date of disposition.

It was held as a matter of fact that the defendant had *not* been physically present himself at the property on 20 February 2012, namely the date of completion of the relevant transfer in favour of the claimants by the Charltons. However, it is clear from the case law that there does not have to be uninterrupted presence. A person may be somewhere else but this does not matter as long there is ‘sufficient physical presence’<sup>8</sup> “to put the purchaser on notice that there is someone in occupation.”<sup>9</sup> The court found that although the defendant had not been in possession of his barn (which he had been renovating by way of putting in new stabling) on 20 February, this did not matter. Newey J found that “ [t]he chances are that Mr Craggs was not at the Farm as much once he had finished constructing the stabling, but he was still there often,”<sup>10</sup> and “[w]hile, moreover, he happened not to visit the Farm on 20 February, he continued to go there frequently, albeit often in connection with activities...in parts of the Farm other than the Craggs Barn.”<sup>11</sup>

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<sup>6</sup>[1991] 1 AC 56.

<sup>7</sup> [2010] 1 P & CR 16.

<sup>8</sup> See M. Davys, *Land Law*, 9<sup>th</sup> ed, (Palgrave, 2015), p268.

<sup>9</sup> Arden LJ in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216, para. 81.

<sup>10</sup> Judgment of Newey J, para. 19.

<sup>11</sup> *Ibid*, para. 22.

In arriving at his conclusion that the defendant had been in “actual occupation” on 20 February 2012 of the land transferred to him, the trial judge took into account Mummery LJ’s dictum in *Link Lending v Hussein*<sup>12</sup>:

“ The degree of permanence and continuity of presence of the person concerned, the *intentions* and wishes of that person, the length of absence from the property and the reason for it and the nature of the property and personal circumstances of the person are among the relevant factors.” [emphasis added]

During the month prior to 20 February 2012, the defendant had “...demolished the existing structure, removed the waste, dug new footings, laid a damp proof course, put concrete on top of it and constructed some stables.”<sup>13</sup> This degree of permanence can readily be distinguished from the acts of planning decoration work in *Abbey National Building Society v Cann*.<sup>14</sup> Further, *Kingsnorth Finance Co Ltd v Tizard* was cited as authority for the proposition that “[r]egular and repeated absence” can be consistent with actual occupation.<sup>15</sup> On the facts of *Baker*, the defendant had clearly demonstrated an *intention* to return.

It should also be borne in mind that in Schedule 3 para 2 of the LRA 2002, occupation of part only of the land will no longer confer an overriding interest;<sup>16</sup> the whole of the land must be occupied. It was held as a matter of fact that the defendant had occupied the yard and barn shortly after the date of the transfer in the defendant’s favour on 17 January 2012, and that for a period of about a month thereafter:

“His presence was neither ‘fleeting’ nor just preparatory to going into occupation. It is true that he was not sleeping at the property, but that cannot matter when there was no

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<sup>12</sup> [2010] EWCA Civ 424 (para. 27).

<sup>13</sup> Judgment of Newey J, at para. 15.

<sup>14</sup> [1991] AC 56.

<sup>15</sup> [1986] 1 WLR 783, at 788.

<sup>16</sup> Thereby reversing the decision in *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 353.



residential accommodation there...where the person using a drive owns it and the house it serves, it may be proper to consider him to be occupying both house and drive as an owner-occupier. Similarly, it seems to me that Mr Craggs will have come to be in ‘actual occupation’ of the yard as well as the Craggs Barn.”<sup>17</sup>

The issue of whether the defendant had an estate contract is considered below under the section concerning overreaching. However, it is felt that a preliminary discussion concerning the point should be noted here for two reasons. Firstly, the Law Commission in their consultation paper on updating the Land Registration Act 2002<sup>18</sup> appear to consider that a person who takes an interest in precisely the same circumstances as the defendant in *Baker v Craggs* has an estate contract. Secondly, the Law Commission recommends that estate contracts should continue as overriding interests. The Law Commission states:<sup>19</sup>

“We also note that, at present, a person who takes an interest under a registerable disposition (for example, a transfer), but whose application for registration is rejected for an administrative reason (perhaps failure to reply to a requisition within the requisite time frame), will benefit from an overriding interest if he or she is in actual occupation. Such an interest (by definition) falls into the category of interest which it is reasonable to expect to be registered. We would, however, be extremely hesitant about removing protection in these circumstances. It seems to us that an overriding interest based on actual occupation plugs a useful “gap” where otherwise the transferee may be vulnerable to a loss of priority, without causing undue prejudice to any person who deals with the land during that time.”

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<sup>17</sup> Judgment of Newey J, at para. 20.

<sup>18</sup> Law Commission, “Updating the Land Registration Act 2002: A Consultation Paper” (The Stationery Office, 2016) Law Com CP No. 227.

<sup>19</sup> Ibid, para 11.26.

## Overreaching

### Inherent structural problems within the Law of Property Act 1925 concerning the meaning of a “legal estate”

The main interest in the case concerns the apparently conflicting provisions of sections 1 (1); 1(2) and 1(4) of the LPA1925. The wording of section 1(1) of the LPA1925 provides that the only two *estates* which can exist at law are an estate in fee simple absolute in possession and a term of years absolute.<sup>20</sup> Section 1(2) LPA 1925 then goes onto define the only *interests* or charges which can exist at law<sup>21</sup> and this list includes:

“ [a]n easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute.”

All other estates, interests and charges are to take effect as equitable interests.<sup>22</sup> Section 1(4) LPA 1925 then goes onto provide that all of the *estates*, *interests* and charges set out in sections 1(1) and 1(2) LPA 1925 are to be referred to as “legal estates”, i.e. the definition encompasses the two *estates* in section 1(1) and the five *interests* set out in section 1(2), which together make up this broad definition of “legal estates”.<sup>23</sup> Many leading textbooks do not comment on section 1(4) LPA 1925,<sup>24</sup> presumably to make it clear that there are the two legal *estates* in section 1(1) LPA 1925; the five legal *interests* in section 1(2) LPA 1925, with all other estates and interests taking effect in equity by virtue of section 1(3) LPA 1925. Section 1(4) is often not commented upon because it appears to contradict the provisions of

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<sup>20</sup> See M.Dixon, Editors Notebook, *The Conveyancer and Property Lawyer*, (2017) 81 Conv. pp3-5.

<sup>21</sup> Five in total.

<sup>22</sup> Section 1(3) LPA 1925.

<sup>23</sup> See, McFarlane, Hopkins, and Nield, *Land Law, Text, Cases, And Materials*, 3<sup>rd</sup> ed, (Oxford, 2015), p 437, fn 25.

<sup>24</sup> See M.Dixon, *Modern Land Law*, 10<sup>th</sup> ed, (Routledge, 2016), pp11-12.

section 1(1) LPA 1925 and therefore serves no real purpose, and on that basis it is reasonable not to make reference to it.

Cheshire and Burn comment on section 1(4)LPA 1925 in the following way:

“ It will be observed that in referring to the first sub-section as *estates* and in the second as *interests* the Act invented a new terminology that depends upon the difference between *a right to the land itself* and *a right to some claim against the land of another person*.”<sup>25</sup>

...“However, the term ‘legal estate’ is still used as shorthand to refer to both the two legal estates (property so-called) and legal interests and charges: LPA 1925, s 1(4).”<sup>26</sup>

Notwithstanding this shorthand, it appears that the only *right to the land itself* after 1925 is by either holding the fee simple absolute in possession or a term of years absolute in possession.

As stated by Gray and Gray:<sup>27</sup>

“Since 1 January 1926 all purchasers have known that the only person competent to transfer a freehold estate at law is the owner of an estate in fee simple absolute in possession. It is correspondingly clear that the only vendor now competent to transfer a legal leasehold estate is one who owns a term of years absolute in possession.”

It seems that the reasons for lumping together *a right to the land itself* and *a right to some claim against the land of another person* under the generic title of “legal estate” was simply to provide that if there were a defect for whatever reason in the creation of these rights, they would then take effect in equity.<sup>28</sup> There is therefore a broad and a narrow interpretation of the term “legal estates”. It does not appear to have been the legislature’s intention for the

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<sup>25</sup> Cheshire and Burn’s *Modern Law of Real Property*, 18<sup>th</sup> ed, (Oxford, 2006), p 124.

<sup>26</sup> Ibid, p124, fn, 78.

<sup>27</sup> Gray and Gray, *Elements of Land Law*, 4<sup>th</sup> ed, (Oxford, 2005), p171.

<sup>28</sup> Ibid, para 2.126, p 169.

expression to have been construed in its broader sense in interpreting the provisions of section 2(1) LPA 1925.

The developments which led to the drafting of the above sections of the LPA 1925 may be seen in paragraphs 24 (b) and (c) of the 1919 Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales:<sup>29</sup>

“The main principles of Mr Cherry’s Law of Property Bill may be stated broadly to be:–

(a)...

(b)To provide that the only estates, interests or charges which, after the Bill becomes operative shall be subsisting or capable of being created at law, shall consist of–

(i) an estate in freehold land in fee simple;

(ii) a term of years absolute

(iii) a like estate or term in mines and minerals apart from the surface, or in the surface apart from the mines and minerals;

(iv) a perpetual rent charge in possession or reversion;

(iv) a rent charge held for a term of years absolute

(v) an easement, right or privilege in or over land for an interest equivalent to a like estate or term;

(vi) any charge secured by a legal term of years absolute

Such estates will be legal estates, and all other estates, interests and charges will take effect in equity only, and will be known as equitable interests.

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<sup>29</sup> 1919 [Cmd. 424].

(c) To place all interests in land except legal estates in fee simple, or for a term of years absolute, behind a curtain consisting of either a trust for sale or a settlement...

Then in Appendix IV of the 1919 Report which is a 'MEMORANDUM OF MR. B.L. CHERRY ON THE PRINCIPLES AND OBJECTS OF THE LAW OF PROPERTY BILL'. paragraph 1 states:

1. The general principles adopted are as follows:

(i) That interests in land should be divided into two classes:—

(a) "Legal Estates" consisting of either the fee simple or a term of years absolute.

(b) "Equitable interests," to include all other interests in land,...

It appears that the intention of the legislature in 1925, having regard to the Fourth Report of the Acquisition and Valuation of Land Committee of 1919, was that there were only ever meant to be two legal estates in land (i.e. the narrow sense of that expression) with the all of the other legal interests, despite their being defined as "legal estates", being rights of third parties in that land. This intention was carried over into the LPA 1925. The issue for the court in *Baker v Craggs* was whether a third party interest such an easement was capable of triggering the overreaching provisions of section 2(1) LPA 1925.

*Is a derivative interest in land such as a legal easement capable of triggering overreaching?*

The trial judge held that it could. This part of the judgment<sup>30</sup> has been criticised on the basis that the reference in section 2(1) of the LPA 1925 to the triggering event for overreaching by "[a] conveyance to a purchaser of a legal estate in land" should not include the grant of a

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<sup>30</sup> See paras 26-33 of the judgment.

legal easement. The problem here concerns the provisions of section 1(4) of LPA 1925 which appear to contradict the provisions of section 1(1) LPA 1925. On that basis, interests and charges such as an easement and a legal mortgage set out in section 2(2) LPA 1925 are also to be treated as a “legal estates”. This formed a crucial part of the judgment. At para 27, Newey J said:

“ While section 1(1) states that an ‘estate in fee simple absolute in possession’ and a ‘term of years absolute’ are the ‘only estates in land which are capable of subsisting or of being conveyed or created at law, section 1(4) explains that the ‘estates, interests, and charges’ authorised to subsist or to be conveyed or created at law by the section are referred to in the Act as ‘legal estates’. The definition thus extends to the various interests ‘capable of subsisting or of being conveyed or created at law’ specified in section 1(2). These include an ‘easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute.’”

On this reasoning Newey J held that as the term “legal estate” included an easement, and that the grant of a legal easement (a limited interest) could trigger the relevant overreaching provisions. On its face, this is a rather surprising result and the academic reasons for this have been cogently argued elsewhere.<sup>31</sup> In fairness, the trial judge would say that he was merely following the provisions of the LPA 1925 by reference to which section 1(4) LPA 1925 apparently equates an easement referred to in section 2(a) LPA 1925 to a “legal estate” so as to bring the grant of an easement within the overreaching machinery of section 2(1) LPA 1925. However, section 2(1) LPA 1925 was surely only ever intended to allow conveyances of legal estates of the fee simple and of the term of years absolute to trigger overreaching. Cherry’s memorandum referred to above makes it quite clear as to what he understood by the

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<sup>31</sup> See M. Dixon, Editors Notebook, *The Conveyancer and Property Lawyer*, (2017) 81 Conv. pp 4-5. See also, *Emmett & Farrand on Title*, paras 5.141-5.143.-

term legal estate, i.e. *the right to the land itself*, not *third party rights affecting that land*. On that basis, it is only when *that land itself* is sold that overreaching can occur and *not when a third party interest in that land is granted*. Overreaching takes place when the beneficiary's interest in *the land itself* is converted into the proceeds of sale of the land, which is hardly the case on the grant of a legal easement in the land.

Of course, this presupposes that overreaching means the transfer of an interest in property to its proceeds (the narrow view of overreaching). The author has considered whether a broader meaning of overreaching could be applied to make the trial judge's reasoning on this point more explicable. Overreaching has also been used in another sense, namely the "[s]ubordination of one interest to another".<sup>32</sup> The reference to overreaching in this broader sense has nothing to do with any proceeds of sale. The author has unearthed an example of overreaching in this broad sense as far back as the seventeenth century.<sup>33</sup> In terms of regarding overreaching as the "transfer of an interest in property to its proceeds"<sup>34</sup> the decision looks somewhat odd. As Dixon says, "[h]ow will the beneficiaries' interest take effect in the purchase money paid for the easement?"<sup>35</sup> However, in terms of simply subordinating one interest to another the decision becomes more explicable. However, there are arguments against this approach.

First, Newey J did not rely on this interpretation, so it did not form part of the judgment which led to his conclusion. Secondly, the seventeenth century authority cited by the author is very old. Thirdly, Emmett & Farrand cite a passage from Wolstenholme and Cherry's

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<sup>32</sup> Megarry & Wade, *The Law of Real Property*, 8<sup>th</sup> ed, (Sweet & Maxwell, 2012), p 136. See also the discussion at paras 6-056 and 25-073 concerning the right of a mortgagor and mortgagee in possession to grant leases subordinating the interests of the mortgagee/mortgagee. However, these rights arise under specific provisions in the LPA 1925 and are therefore different in nature from the point being discussed in the text.

<sup>33</sup> See *Fox v Prickwood*, (1614) 2 Bulst. 224; 80 E.R. 1079. This is discussed in G. Owen, "A New Model for Overreaching—Some Historical Inspiration", (2015) 79 Conv. p 228.

<sup>34</sup> Megarry & Wade, *The Law of Real Property*, 8<sup>th</sup> ed, (Sweet & Maxwell, 2012), p137.

<sup>35</sup> Dixon, Editors Notebook, *The Conveyancer and Property Lawyer*, p4. However, see the reasoning of Newey J. in the hypothetical case detailed in para. 32 of his judgment.

Conveyancing Statutes<sup>36</sup> which states that the narrow view of overreaching has been used since 1882. Finally, the author has carefully considered the Fourth Report of the Acquisition and Valuation of Land Committee of the Transfer of Land in England and Wales and cannot find any evidence to support the broader interpretation of overreaching in this context.

This is not to say that in the context of some of the provisions of the LPA 1925 the expression legal interests cannot always be equated to estates in land without difficulty. For instance “all legal interests in land are ‘estates in land’ for the purposes of LPA 1925, s 52 (see LPA 1925, s 1(4))...”<sup>37</sup> However, in the context of overreaching the position is very different and it is suggested that the judge’s reasoning on this point was *per incuriam* and that the matter should be reconsidered by another court or by the Law Commission.

## I

*The nature of the defendant’s interest—when is an estate contract not an estate contract?*

In order to determine whether the defendant’s interest was capable of being overreached, the court had to determine the precise nature of that interest, as not all interests are capable of being overreached. Counsel for the defendant argued that the nature of the defendant’s interest was, in truth, an estate contract, based upon the contract entered into between the Charltons and the defendant, and as such was incapable of being overreached pursuant to section 2(3) (iv) Law of Property Act 1925. The defendant premised his argument on the footing that between exchange of contracts and the time when the defendant became the registered proprietor of the yard, the defendant’s equitable interest (i.e. his interest in the

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<sup>36</sup> Wolstenholme and Cherry’s Conveyancing Statutes 13<sup>th</sup> ed, 1972 vol .1.p51. See *Emmett & Farrand* at para 5.141.

<sup>37</sup> See M. Davys, *Land Law*, 9<sup>th</sup> ed, (Palgrave, 2015), p196.



yard) had no independent existence beyond the contract which had created it, and remained an estate contract up until the time when it merged with the title *on registration*.

The defendant cited *Lloyds Bank plc v Carrick* in support of this argument.<sup>38</sup> It will be recalled in that case the court held that Mrs Carrick had an estate contract based upon her specifically-performable contract for the purchase of an interest in land.<sup>39</sup> In order for Mrs Carrick to win her case against the bank, which was claiming possession from her, she had to show that she had acquired an interest separate and distinct from the contract. The reason for this was because *Carrick* concerned unregistered land and as Mrs Carrick had not protected her interest as a C(iv) land charge (i.e. the estate contract) the bank were not on notice of her rights. It was for this reason that she had to assert rights outside of the contract; and the court held that she could not. Counsel for the defendant seized upon this finding and argued by parity of reasoning that it should be open to the defendant to argue that his rights, too, had no independent existence outside of the contract, thereby bringing the defendant within the ambit of section 2(3)(iv) of the Law of Property Act 1925.

However, as noted by the trial judge in his judgment, there is the world of difference between the facts of this case and *Carrick*. In *Baker v Craggs*, there was a transfer in the defendant's favour; there was no transfer in Mrs Carrick's favour. Thus, in *Baker*, the judge held that the contract merged in the transfer to the defendant, thereby rendering the contract spent at that point. In *Carrick* there was no transfer into which the contract could merge, and that is why her interest remained contractual.

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<sup>38</sup> [1996] 4 All ER 630.

<sup>39</sup> *Carrick* was a case which pre-dated the provisions of the Law of Property (Miscellaneous Provisions) Act 1989, and was decided by reference to the old provisions rendering unenforceable contracts for the sale of land in the absence of a written memorandum or sufficient acts of part performance.

Counsel for the claimants cited in argument the dictum of Baroness Hale in *Mortgage Business plc v O'Shaughnessy*<sup>40</sup>:

“There is a gap between any transaction and its registration...Until registration, the purchaser (and indeed the mortgagee) have only equitable interests. This might suggest that rights granted by the purchaser to an occupier could not be ‘fed’ until registration. However, this is machinery, not substance. Assuming that all relevant registration requirements are met, the purchaser has now acquired an absolute right to the legal estate (and the mortgagee an absolute right to the charge). Her interest is of a different order from that of a purchaser before completion, who has the contractual right to have the property conveyed to her but may never in fact get it.”

In other words, according to the judgment in *Baker v Craggs*, following exchange of contracts but prior to completion, the defendant had an estate contract but after completion took place, that contract was spent and became subsumed by way of merger in the transfer. The transfer of the yard in favour of the defendant took place on 17 January 2012 and it was on date that the judge held that the defendant’s estate contract was spent. Therefore, when the Charltons granted the claimants their rights over the yard by one of the transfers dated 20 February 2012, the defendant no longer had an estate contract to defeat overreaching. Rather, he held an equitable estate which was capable of being overreached and, on that basis, the defendant’s rights were overreached and his registration of the yard was subject to the claimants’ easement.

However, the matter is not free from doubt and Dixon has argued cogently that:

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<sup>40</sup> [2014] UKSC 52.

“ It is, however, arguable that a contract for the grant of a legal estate is still in existence *until* the legal estate is granted, and this is *now* the moment of registration, not the moment of completion. Indeed, this would be consistent with the earlier finding in this very case that the Charlton’s still owned legal title because Mr Craggs was not registered...and the heart of the matter is whether the advent of registered title has changed the well-established rule, developed when there was no registration requirements, that a contract merges with the transfer on completion. The notion of ‘title by registration’ would seem to support a change, but the pragmatic positions taken in *Abbey National v Cann* and *Scott v Pacific Mortgages* (on the nature of conveyancing transactions and their separateness) might not. ”<sup>41</sup>

At paragraph 40 of his judgment, Newey J cited the decision in *Knight Co Ltd v Alberta Railway & Irrigation Co.*<sup>42</sup> In this Privy Council case “after quoting and considering Canadian provisions, the conclusion reached was that agreements for sale merged with transfers when registered...”<sup>43</sup> It is difficult, therefore, to follow the trial judge’s reasoning when he cited it as authority for the proposition that a contract for the sale of registered land merges into a transfer.<sup>44</sup> This is not a binding authority in this jurisdiction and from the above discussion the point is still fraught with difficulty.

## Conclusions

*Baker v Craggs* serves as a salutary reminder to practitioners to ensure that they supply plans which are land registry compliant.<sup>45</sup> Had proper plans been prepared at the outset, it may well

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<sup>41</sup> Dixon, Editors Notebook, *The Conveyancer and Property Lawyer*, p 3.

<sup>42</sup> [1938] 1 All ER 266.

<sup>43</sup> *Emmet & Farrand*, para 5,143.

<sup>44</sup> See para 40 of judgment of Newey J.

<sup>45</sup> See Guidance for preparing plans for Land Registry applications, updated 20 January 2017.

be the case the Land Registry would not have raised any requisitions with the result that the defendant's application for registration would have proceeded smoothly and attained priority over the claimants' application. Further, once requisitions are raised, they should be answered promptly. As the case shows, a cancellation of an application to register in the registration gap can lead to a loss of priority.

The case does not clarify the position as to when an estate contract ceases to be an estate contract in the context of registered land. By reference to the sources cited in this case note, it appears that the Law Commission is clear that an unregistered transfer is an estate contract until it is registered. However, this is at variance with the decision in *Baker v Craggs* and also with some of the authorities cited in the judgment. It is suggested that a more appropriate question for the Law Commission to consider would be whether a contract for the purchase of registered land merges on completion or on registration, and then to consider whether it should still be capable of achieving overriding status.

In the context of overreaching, the case should be viewed as one in which the trial judge applied too broad an interpretation to the term "legal estate" in the context of section 2(1) LPA 1925. For the reasons put forward in this case note, this was never the legislature's intention and, at best, it must be an unintended consequence of section 1(4) LPA 1925. The judgment of Newey J on this point may well be considered by another court or by the Law Commission.

